

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 22, 2008 Session

CHARLES E. ROBINSON v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Williamson County
No. CR051850 Timothy L. Easter, Judge**

No. M2007-01392-CCA-R3-PC - Filed February 26, 2009

Petitioner, Charles E. Robinson, appeals the dismissal of his petition for post-conviction relief in which he alleged that his trial counsel rendered ineffective assistance of counsel. Specifically, Petitioner contends that his trial counsel's assistance was ineffective because he failed to (1) call an expert witness to rebut the State's fingerprint evidence; (2) challenge the chain of custody for the handgun introduced as an exhibit at trial; (3) object to the admission of testimony concerning the .22 caliber bullets found in Petitioner's residence; (4) request a transcript of the preliminary hearing; (5) file a motion to suppress; (6) request oral argument on the motion for new trial; (7) object to the prosecutor's statements during oral argument; and (8) stipulate that Petitioner was a convicted felon. After a thorough review of the record, we conclude that Petitioner has failed to show that his trial counsel rendered ineffective assistance and affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Christina Farrell Daugherty, Franklin, Tennessee, for the appellant, Charles E. Robinson.

Robert E. Cooper, Jr., Attorney General and Reporter; James E. Gaylord, Assistant Attorney General, Kim R. Helper, District Attorney General; and Derek K. Smith, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Following a jury trial, Petitioner was convicted of possession of a handgun by a convicted felon. The facts surrounding Petitioner's convictions were summarized by this Court in the direct appeal as follows:

On November 12, 2002, the defendant's parole officer initiated a search of the defendant's residence because the defendant was suspected of harboring two fugitives. Officers from the Franklin Police Department executed the search. When the police entered the defendant's residence sometime after midnight, the defendant and several other people were present. The defendant was seated in his living room. A search of the residence revealed a .22 caliber handgun, which was found in a container with the defendant's clothes in the defendant's bedroom. Between 30 and 60 .22 caliber bullets were found throughout the defendant's residence. When the police presented the gun to the defendant, his demeanor was "indifferent," and he later told the police that the gun was inoperable. At the time of trial, the defendant had two prior felony convictions, a 1992 conviction for sale of a controlled substance and a 1993 conviction for sale of cocaine.

State v. Charles E. Robinson, No. M2004-01163-CCA-R3-CD, 2005 WL 2008186, *1 (Tenn. Crim. App., at Nashville, Aug. 17, 2005), perm. to appeal denied (Tenn. Dec. 27, 2005).

II. Post-Conviction Hearing

At the post-conviction hearing, Petitioner testified that his trial counsel did not call an expert witness who could present testimony concerning the recovery and identification of fingerprints. Petitioner acknowledged that his fingerprints were not found on the weapon. Trial counsel also did not call a witness who could rebut the State's evidence that the handgun was functional. Petitioner stated that trial counsel did not explain to him whether the .22 caliber handgun found in his residence fell within the statutory definition of "handgun" found in the convicting statute.

Petitioner said that he did not discuss the possibility of challenging the chain of custody for the .22 caliber handgun with trial counsel. Petitioner acknowledged that the .22 caliber bullets found in his residence were not introduced as an exhibit at trial, and he said that he did not discuss this issue with trial counsel.

Petitioner acknowledged that he did not ask trial counsel to obtain a transcript of his preliminary hearing, but he said that the transcript would have shown what Melvin Ellison had testified to at the preliminary hearing. Petitioner said that trial counsel did not discuss with him waiving oral argument in the motion for new trial hearing.

Petitioner said that he remembered the prosecutor making the following statement during closing argument: "You know, what two convicted felons are doing associating with one another is beyond me, but that's what's going on." Petitioner said that trial counsel should have objected to the statement because it informed the jury that he was a convicted felon. Petitioner said that he asked trial counsel to file a motion to suppress. Petitioner stated that the police officers did not have a search warrant when they arrived at his house, and trial counsel did not ask for the identity of the informant in the case.

Petitioner said that he wanted trial counsel to stipulate that he was a convicted felon, but the State introduced evidence at trial that he had been convicted of two drug felony charges.

On cross-examination, Petitioner acknowledged that the .22 caliber handgun was tested for fingerprints, and that the test results were inconclusive and acknowledged that trial counsel used the lack of fingerprint evidence to his advantage during cross-examination of the State's witnesses. Petitioner conceded that he did not have any evidence to show that the handgun was inoperable.

Petitioner acknowledged that if trial counsel had stipulated that he was a convicted felon without disclosing the nature of his crimes, that the jury might have thought he had committed a violent felony. Petitioner confirmed that his theory of defense was based on his allegation that Mr. Ellison, who was also a convicted felon, owned the gun found in Petitioner's residence. Petitioner also acknowledged that he was on parole at the time of the offense and understood that his parole officer could enter his residence without a search warrant.

Petitioner said that he met with trial counsel only once prior to trial while he was incarcerated in the county jail, but he conceded that trial counsel was never unavailable if Petitioner needed to speak with him. Petitioner said that he was not familiar with the process involved with a motion for new trial, but he had expected to attend a hearing on his motion.

Petitioner acknowledged that trial counsel effectively cross-examined the State's witnesses about the fact that no one had seen Petitioner with possession of the gun and that other people, including Mr. Ellison, had access to his bedroom. Petitioner said that he believed that trial counsel had "done a good job," and he felt that he was convicted because of Mr. Ellison's statement to the investigating officers which Petitioner maintained was false.

Trial counsel testified that he did not feel it was necessary to challenge the fingerprint testing performed on the weapon because it was made clear during the trial that Petitioner's fingerprints were not discovered on the weapon. Trial counsel said that he might have pursued expert testimony if the test had shown the presence of at least one fingerprint, but no such testimony was presented. Trial counsel said that the lack of fingerprints made it unnecessary to challenge the chain of custody of the weapon. The fact that the weapon was found in Petitioner's bedroom was not in dispute. Trial counsel stated that he did not recollect why he did not object to testimony about the .22 caliber bullets found in Petitioner's residence.

Trial counsel acknowledged that he did not have a transcript of the preliminary hearing at the time of trial although he had the digital video disc (DVD) of the hearing. Trial counsel said that initially he did not believe the transcript was necessary because he planned to call Mr. Ellison as a witness. It was his understanding that Mr. Ellison would testify that he brought the .22 caliber handgun into Petitioner's residence, that he never told Petitioner about the gun, and that Petitioner never saw the gun. On the morning of trial, however, Mr. Ellison's attorney told trial counsel that he might reconsider calling Mr. Ellison to testify because he might "not like what he [had] to say."

Based on this information, trial counsel believed that Mr. Ellison's testimony might prove detrimental to Petitioner's case and ultimately decided not to call him as a witness.

Trial counsel acknowledged that he thought Sergeant [Carl Smith's] trial testimony that Mr. Ellison said that Petitioner knew about the gun was incorrect based on Sergeant [Smith's] preliminary hearing testimony. Trial counsel said that he had to make an immediate decision as to whether to introduce the DVD of the preliminary hearing for impeachment purposes. Trial counsel decided against that course of action because he would have had to play all of that portion of the DVD pertaining to Mr. Ellison's testimony before the jury. Trial counsel felt such action would be detrimental to Petitioner because trial counsel did not believe that Mr. Ellison sounded credible at the preliminary hearing.

Trial counsel did not have a present recollection of whether he appeared at a hearing on Petitioner's motion for new trial, but he did attach the DVD of the preliminary hearing as an exhibit to the motion. Trial counsel said that he was surprised by the prosecutor's remark about "two convicted felons" associating with one another. Trial counsel decided not to object because the remark was fleeting, and he did not want to call attention to it. Trial counsel acknowledged that he argued the propriety of the statement on appeal and that he believed that Petitioner was prejudiced by the remark.

Trial counsel said that he spent time researching the possibility of filing a motion to suppress, but he could not remember the specific thought processes behind his decision not to do so. Trial counsel also could not recollect why he did not pursue the informant's identity, and acknowledged that it might have made a difference if he could have potentially discredited the informant's information.

Trial counsel said that he argued at trial against the admission of evidence showing that Petitioner was a convicted felon. Once the trial court ruled the evidence admissible, however, trial counsel said that he did not want to leave the jury the impression that the underlying felony was murder or some other violent offense. Trial counsel said that he did not believe it prejudiced the jury to hear that Petitioner had two prior felony drug convictions instead of one.

On cross-examination, trial counsel said that he worked for a private law firm after graduating from law school and then started his own practice. He said that the number of criminal cases he had handled numbered "in the hundreds." Trial counsel said that after the preliminary hearing and review of the State's discovery, he felt that he "had command of the evidence going into the trial." Trial counsel confirmed that he did not file a motion to suppress either because he believed that such action was not warranted or because he felt that he would not prevail based on the circumstances of the case and his research. Trial counsel said that he was pleased when the State did not introduce the bullets found in Petitioner's residence as an exhibit at trial because he felt a visual reminder of this evidence would be prejudicial to Petitioner's case.

Trial counsel felt that he had a good relationship with Petitioner, and he could not recollect a time when Petitioner wanted to speak with him and he was unavailable.

III. Standard of Review

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. T.C.A. § 40-30-110(f). However, the trial court's application of the law to the facts is reviewed de novo, without a presumption of correctness. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to de novo review. Id.; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. Id. at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the Strickland test before he or she may prevail on a claim of ineffective assistance of counsel. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. Id. Failure to satisfy either prong will result in the denial of relief. Id. Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

IV. Analysis

A. Fingerprint Evidence

Petitioner argues that trial counsel was ineffective for failing to call an expert witness to challenge Sergeant Arnold's testimony that the fingerprint test results for the .22 caliber handgun were "inconclusive." Specifically, Petitioner submits that if such a challenge had been explored, an expert witness might have been able to definitively exclude Petitioner's fingerprints from the weapon.

Sergeant Arnold testified that a number of self-occluding fingerprints were found on the handgun, but because the fingerprints were on top of one another, it was impossible to identify any specific fingerprint. Sergeant Arnold also testified that he could not say that Petitioner's fingerprints were on the gun. The trial court found that trial counsel "simply had no reason to call an expert regarding the gun contamination as the Petitioner's fingerprints were not found on the weapon in question." Petitioner only speculates as to what an expert witness might or might not have been able to say at trial, and he did not call a witness at the post-conviction hearing who might have clarified Petitioner's position. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) ("It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of . . . what a witness's testimony might have been if introduced by defense counsel."). The evidence does not preponderate against the trial court's finding that trial counsel's conduct in regard to this issue was not deficient. Petitioner is not entitled to relief on this issue.

B. Chain of Custody

Petitioner argues that if trial counsel challenged the chain of custody of the handgun introduced as an exhibit at trial, the evidence might have been excluded. Relying on State v. Holloman, 835 S.W.2d 42 (Tenn. Crim. App. 1992), Petitioner argues that the handgun was improperly introduced through the testimony of David Pratt, Petitioner's parole officer.

In Holloman, this Court stated that "in order to admit physical evidence the party offering the evidence must either introduce a witness who is able to identify the evidence or must establish an unbroken chain of custody." Id. at 46. Mr. Pratt testified that the handgun produced at trial was the one he saw in Petitioner's residence, although he acknowledged that the gun had already been removed from the bedroom when he first saw it. Petitioner contends that trial counsel was ineffective because a chain of custody challenge could have led to the exclusion of the evidence.

The handgun was introduced for identification purposes as Exhibit 1 without objection during Mr. Pratt's direct examination. Trial counsel testified at the post-conviction hearing that he did not object because Petitioner's fingerprints were not found on the handgun, and there was no dispute that a handgun was found in Petitioner's bedroom. Sergeant Smith subsequently identified Exhibit 1 as the handgun which he removed from the clothes hamper in Petitioner's bedroom. Although Sergeant Smith was not asked about the chain of custody pertaining to the handgun, such an omission does not necessarily lead to the conclusion that such questioning would have resulted in exclusion of the evidence. Petitioner did not introduce any evidence at the post-conviction hearing which would indicate that a break in the chain of custody had occurred. Moreover, trial counsel's decision not to object to the introduction of the handgun was a matter of trial strategy not subject to hindsight review. Based on our review, we conclude that Petitioner has failed to show that he was prejudiced as a result of trial counsel's decision not to challenge the handgun's chain of custody. Petitioner is not entitled to relief on this issue.

C. Testimony Concerning the Ammunition

Petitioner argues that trial counsel's performance was deficient because he did not object to the admission of testimony concerning the .22 caliber bullets found in Petitioner's residence. Relying on Rule 602 of the Tennessee Rules of Evidence, Petitioner appears to suggest that the State failed to establish that its witnesses had personal knowledge of the bullets because the bullets were not introduced as an exhibit at trial. Accordingly, Petitioner argues, the testimony would have been found inadmissible had trial counsel interjected an objection.

As Petitioner points out, Rule 602 states that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Tenn. R. Evid. 602. Rule 602 continues, however, that "[e]vidence to prove personal knowledge may, but need not, consist of the witness's own testimony."

Mr. Pratt, Sergeant Smith, and Sergeant Arnold each testified that they were present in Petitioner's residence and each personally observed a large number of .22 caliber bullets in Petitioner's residence. The evidence was relevant to establishing Petitioner's constructive possession of the .22 caliber handgun. See Tenn. R. Evid. 401. Moreover, trial counsel testified that he believed it was beneficial to Petitioner that the bullets were not introduced at trial because they would have had a visual impact on the jury that might be prejudicial to Petitioner's case. Based on the foregoing, we conclude that Petitioner has failed to show that he was prejudiced by trial counsel's failure to object to testimony concerning the bullets. Petitioner is not entitled to relief on this issue.

D. Failure to Request a Transcript of the Preliminary Hearing

Petitioner contends that his trial counsel provided ineffective assistance because he failed to obtain a transcript of the preliminary hearing prior to trial. Petitioner argues that if he had done so, trial counsel would have been able to impeach Sergeant Smith's testimony about Melvin Ellison's statements at the hearing.

Melvin Ellison was present in Petitioner's house when the police officers executed the search warrant. Mr. Ellison testified at the preliminary hearing that he found the handgun by the railroad tracks, took it to Petitioner's house where Mr. Ellison was staying, and hid it in Petitioner's bedroom after he ascertained that the handgun did not work. Mr. Ellison said that he did not tell Petitioner about the gun.

Based on the preliminary hearing testimony, trial counsel intended to call Mr. Ellison as a witness at trial. On the morning of trial, however, his conversation with Mr. Ellison's attorney indicated that Mr. Ellison's testimony might not be beneficial to Petitioner, and trial counsel decided not to call Mr. Ellison as a witness. Instead, trial counsel sought to introduce testimony concerning Mr. Ellison's prior claim of ownership of the gun through Sergeant Smith's cross-examination. Sergeant Smith testified on cross-examination that he was aware that Mr. Ellison had admitted under oath at the preliminary hearing that the gun was his, and that Mr. Ellison had also been arrested for

possession of a handgun by a convicted felon arising out of the same incident. Sergeant Smith acknowledged that Petitioner's fingerprints were not on the gun, and that he could not tell the jury that Petitioner was the one who put the gun in his bedroom.

In response to the State's redirect examination, however, Sergeant Smith testified that Mr. Ellison had said during the preliminary hearing that "he found a gun at some railroad tracks and kept it on him for a little while; ended up back at [Petitioner's]; they fooled with it some, and then he gave [the gun] to [Petitioner]." On re-cross-examination, Sergeant Smith reiterated that he believed that Mr. Ellison had testified at the preliminary hearing that he gave the gun to Petitioner.

Trial counsel testified at the post-conviction hearing that he decided not to impeach Sergeant Smith's credibility with DVD of the preliminary hearing because he would have had to play the DVD in its entirety, and he did not want the jury to view Mr. Ellison testifying. Trial counsel believed that Mr. Ellison did not appear credible at the hearing, and that replaying the DVD in front of the jury would be detrimental to Petitioner's case. Trial counsel acknowledged that he attached the preliminary hearing DVD instead of a transcript as an exhibit to his motion for new trial.

As the State contends in its brief, there was no need for trial counsel to request a transcript of the preliminary hearing prior to trial because he intended to call Mr. Ellison as a witness. Approximately thirty minutes before trial, however, Mr. Ellison's attorney told trial counsel that he might not want to call Mr. Ellison as a witness and suggested that he might "not like what he [had] to say." Although trial counsel made a strategic decision to abandon his plan of calling Mr. Ellison, he nonetheless was able to elicit testimony from Sergeant Smith concerning Mr. Ellison's out-of-court statement that the gun belonged to him, and that Mr. Ellison was also being prosecuted for the same offense as Petitioner.

"[T]he fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance," as long as the strategy is informed and based on adequate preparation. Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Based on our review of the circumstances existing at the time the decision was made, we conclude that trial counsel's strategic decision not to discredit Sergeant Smith's testimony by playing the DVD for the jury was within the range of competence demanded of defense counsel.

Petitioner also argues that trial counsel's conduct was deficient because he failed to include a transcript of the preliminary hearing with his motion for new trial, and attached only the DVD after waiving oral argument. In his direct appeal, Petitioner argued that he was denied a fair trial because Sergeant Smith testified falsely at trial. Charles E. Robinson, 2005 WL 2008186, at *3. A panel of this Court noted that the record did not reflect that the trial court had reviewed the DVD prior to ruling, and thus the DVD was not itself communicative. Id. at *5. Although Petitioner was granted leave to supplement the record on appeal with a transcript of the preliminary hearing, the transcript afforded the panel a view of the evidence that may not have been viewed by the trial court. Id. Nonetheless, we concluded that even if the transcript was considered on appeal, "the transcript

merely reveal[ed] the use of inaccurate testimony at trial,” and that Petitioner had failed to establish that the State knowingly presented material false testimony. Id.

Based on our review, we conclude that Petitioner has failed to demonstrate a reasonable probability that but for counsel's failure to include a written transcript of the preliminary hearing as an exhibit, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Petitioner is not entitled to relief on this issue.

E. Failure to File a Motion to Suppress

Petitioner argues that trial counsel's assistance was ineffective because he failed to file a motion to suppress the evidence seized as a result of the execution of a search warrant. Petitioner contends that if trial counsel had discovered proof that the information provided by the confidential informant, which apparently led to the issuance of the search warrant, was “unreliable or nonexistent, then the search of the residence would have been suppressed.”

The search warrant is not included in the record on appeal. We glean, however, that the police officers received information from a confidential informant that Petitioner was harboring fugitives, and that the fugitives had just left Petitioner's house when the police officers arrived. Petitioner does not offer any suggestion of what further research of the suppression issue might have revealed and merely speculates that the results of the trial might have been different if trial counsel had filed a motion to suppress. Based on our review, we conclude that the evidence does not preponderate against the trial court's finding that trial counsel adequately researched the possibility of challenging the search warrant and concluded “that any such motion would have been futile.” Petitioner is not entitled to relief on this issue.

F. Waiver of Oral Argument

Petitioner argues that trial counsel's performance was deficient because he waived oral argument on the motion for new trial. Petitioner submits that if trial counsel had personally appeared at the motion, he could have assured that the trial court's attention was directed to the portion of the DVD reflecting a difference between Sergeant Smith's testimony at the preliminary hearing and that presented at trial. Petitioner contends that “the outcome would have been different due to the fact that the police officer's testimony would have been impeached on an extremely important issue.”

On appeal, we observed that the record was not clear whether the trial court had reviewed the preliminary hearing DVD. Nonetheless, we concluded that the transcript merely revealed the presence of inaccurate testimony by the State's witness. The post-conviction court, in which Petitioner's trial was also conducted, found that “oral argument would [not] have reasonably caused a different result of the proceedings.” Based on our review, we conclude that Petitioner has failed to establish that he was prejudiced by trial counsel's waiver of oral argument on the motion for new hearing.

G. Failure to Object to Prosecutor's Closing Argument

Petitioner argues that he received ineffective assistance when trial counsel failed to object to the prosecutor's remark during closing argument that "you know, what two convicted felons are doing associating with one another is beyond me, but that's what was going on." In Petitioner's direct appeal, a panel of this Court considered whether this comment constituted reversible error notwithstanding trial counsel's failure to object. Charles E. Robinson, 2005 WL 2008186, at *6. The panel stated that:

[w]e note that the prosecutor's remark was "fleeting" and an isolated comment, rather than a stream of commentary throughout the state's closing argument. Moreover, we find that the state's case was relatively strong, as evidenced by the numerous rounds of .22 caliber bullets found throughout the defendant's residence, by the defendant's informing the police that he exclusively used his bedroom where the handgun was found, and by his statement to the police in which he informed them that the gun was inoperable. Accordingly, this issue does not entitle the defendant to relief.

Id.

The post-conviction court agreed with these conclusions and found that Petitioner had failed to demonstrate prejudice. Moreover, trial counsel testified that he made a tactical decision not to call attention to the remark by interjecting an objection. Based on our review, we conclude that Petitioner has failed to demonstrate prejudice or that trial counsel's conduct fell below the reasonable standard expected of defense counsel. Petitioner is not entitled to relief on this issue.

H. Failure to Stipulate to Petitioner's Status as a Convicted Felon

Petitioner argues that his trial counsel's assistance was ineffective for failing to stipulate at trial that he was a convicted felon. In the absence of such a stipulation, the State was allowed to introduce evidence of the nature of Petitioner's two prior felony convictions. Petitioner contends that he was prejudiced by the introduction of this evidence.

When evidence of a defendant's prior conviction is necessary to prove the status element of an offense, as in the case sub judice, the defendant may offer to stipulate his status as a felon. State v. James, 81 S.W.3d 751, 762 (Tenn. 2002). If the defendant does so stipulate, disclosure of the names or nature of the prior convictions has "little probative value and [is] likely to provoke the jury's prejudice." Id. In the absence of a stipulation, however, the "probative value of an essential element of the offense would almost always outweigh any potential prejudice under Rule 404(b) [of the Tennessee Rules of Evidence], [and therefore the] specific nature of the offense w[ould] be admissible." State v. Wingard, 891 S.W.2d 628, 634 (Tenn. Crim. App. 1994) (overruled on other grounds James, 81 S.W.3d at 763 n.7).

Trial counsel testified that he made a tactical decision not to stipulate to Petitioner's status as a convicted felon because he did not want to leave the nature of the underlying offenses to the jury's imagination. Without a stipulation, the State properly introduced evidence that Petitioner's prior convictions were drug related, and not violent offenses, as was trial counsel's intention. The post-convicting court found that it could "neither disagree nor find any fault with [trial counsel's] trial strategy not to stipulate to a prior felony conviction leaving the jury to ponder the level of Petitioner's prior criminal behavior and convictions." We conclude that the evidence does not preponderate against this finding. Moreover, as this Court concluded on appeal, the trial court's instruction to the jury not to consider the evidence of Petitioner's prior convictions as propensity to commit the crime of possession of a handgun by a convicted felony, was an "appropriate precautionary measure[] to safeguard against any potential resulting prejudice."

Charles E. Robinson, 2005 WL 2008186, at *3.

Based on our review, we conclude that Petitioner has failed to show that his trial counsel was deficient in this regard, or that he was prejudiced by trial counsel's decision not to stipulate to Petitioner's status as a convicted felon.

CONCLUSION

After a thorough review, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE